IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1165 OF 2006

IN

SUIT NO. 3699 OF 1995

Eric Parvez Khaver & Ors.	...	Plaintiffs
Versus		
Manilal Premji Gala & Anr.	...	Defendants
And		
Khodadad H. Irani	...	Applicant/ Defendant No.2

K.A. Sampat for Plaintifs.

Mr. N.C. parikh i/b. Mansukhlal Hiralal & Co. for defendant No.1 to show cause.

Mr. J.M. Mehta i/b. Bhaishankar Kanga & Girdharlal for defendant No.2 in support of Chamber Summons.

CORAM: S.K.SHAH,J.

DATE : 6th December, 2006.

P.C.

1. This Chamber Summkons is taken out by the Applicant/Defendant No.2 seeking leave to cross-examine the defendant No.1.

2. The evidence of defendant No.1 was recorded from time to time and completed on 21st June, 2006. On that day, the cross-examination of the defendant No.1 by the Advocate for the plaintiffs was completed. The defendant No.1 was called upon to re-examine himself, but there was no re-examination. As such, the evidence of defendant No.1 was closed. It appeaers that thereafter the matter appeared on 12.2.2006 when the defendant No.1 gave copy of the affidavit of evidence to the Advocate for the Plaintiff as well as the Advocate for the defendant No.2. Thereafter, the matter appeared on 26.7.2006, 2.8.2006 and 9.8.2006. but on these dates, the matter was simply adjourned.

3. The present Chamber Summons is taken out by the defendant No.2 on 28.8.2006. In the affidavit-in-support of the Chamber Summons, the defendant no.2 stated that on 9.8.2006, when the matter had appeared, the defendant NO.2 by his Advocate's letter had already informed the Advocates for the 1st defendant that the cross-examination of the the defendant No.1 by defendant no.2 was not done as the name of the Advocate was not shown on Board on 21.6.2006 when the evidence of defendant No.1 commenced. Therefore, the learned Counsel for the defendant No.2 requested the Court to allow him to cross-examine defendant no.1. However, on that day, i.e. 9.8.2006, the learned Counsel for the defendant NO.1 objected and

therefore the defendant no.2 was allowed to take out Chamber Summons. Accordingly, the present Chamber Summons is taken out.

4. The contention of the defendant No.2 is that he had right to cross-examine the defendant No.1 after the defendant No.1's cross-examination by the plaintiff was over on 21.6.2006. However, since the name of the Advocate for defendant No.2 did not appear on 21.6.2006, the learned Counsel for the defendant no.2 could not remain present in Court to cross-examine the defendant No.1.

5. This Chamber Summons is opposed by the defendant No.1 by filing reply. The learned Counsel for the defendant No.1 opposed the Chamber Summons mainly on the ground that on 12.7.2006, when the matter appeared on board the copy of the affidavit of examination in chief of the next witness was given to the leatrned Counsel for the defendant No.2.

6. The learned Counsel for the defendant No.1 also submits that the matter was on board on 26.7.2006 and 28.7.2006 when the learned Counsel for the defendant No.2 was present, although his name was not shown. The learned Counsel submits that this amounts to recall of the witness of the defendant No.1 and in his submission, it is not permissible under Order 18 Rule 17 of the C.P.C. as also under Section 151 of the C.P.C. In

support of his subnmission, he relied on a decision of this Court in the case of **Balkrishna Shivappa Shetty vs. Mahesh Nenshi Bhakta & Ors., reported in 2003(4) Bom. C.R. 45 as also the decision reported in AIR 2004 (P & H) 0-377.**

7. Although it is a recall of witness, it is mainly for the purpose of giving opportunity to the defendant No.2 to cross-examine defendant No.1 which opportunity was denied for no fault of defendant No.2. This is so because, the name of the learned Advocate for defendant No.2 was not shown on board on 21.6.2006 when the evidence of defendant no.1 was closed. The facts in the aforesaid two cases which are relied bythe learned Counsel for the plaintiff were entirely different than the facts of the present case. In both the cases cited above, the evidence was closed after the parties were given opportunity to cross-examine the witness. This is not the case in the present case. The ratio in those decisions would not apply to the facts of the present case.

8. It is undisputed that on 21.6.2006, the name of the Counsel for Defendant No.2 was not shown on board. It is for that reason the Counsel for the defendant No.2 could not remain present in Court and the evidence of defendant No.1 came to be closed. It is true that the learned Counsel for the plaintiff applied earlier for recall of defendant No.1. However, the learned Counsel

for the defendant No.2 submits that the defendant No.2 never came to know that the evidence of defendant No. 1 was closed on 21.6.2006.

9. Under these circumstances, in the interest of justice, the Chamber Summons needs to be allowed, giving an opportunity to the defendant No.2 to cross-examine the defendant No.1.

10. As such, the Chamber Summons is allowed and made absolute in terms of prayer (a). No order as to costs.

11. The defendant No.1 should remain present in Court on 17.1.2007 for the purpose of cross-examination by the Counsel for the Defendant No.2.

S.O. to 17.1.2007.

(S.K.SHAH,J.)

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